Supreme Court, U.S.
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No. 93-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ROBERT SIMMONS,

Petitioner,

v.

RONALD PRYOR AND
CITY OF EVANSTON,

Respondents.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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32 pp

QUESTIONS PRESENTED

1. Is a police officer, who misuses his office to cause an arrest, liable for damages under 42 U.S.C. §1983 if a reasonable officer *could* have believed that the arrest was lawful?

2. In a civil action seeking damages for the violation of Fourth Amendment rights, should the issue of "reasonableness" be determined as a matter of law by what a reasonable police officer *could* have believed or as a question of fact by what a reasonable officer *would* have believed?

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ROBERT SIMMONS,

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v.

RONALD PRYOR AND
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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Robert Simmons respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 9, 1993.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-10) and its order amending its opinion (App. 12-13) are reported at 9 F.3d 555. The opinions of the district court (App. 14-17, App. 18-19) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals (App. 11) was entered on September 9, 1993; petitioner's timely petition for rehearing was denied on December 14, 1993. (App. 12.)

STATUTES INVOLVED

This case involves 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

In October of 1989, officers of the Evanston, Illinois police department responded to a call of a domestic disturbance at the home of Robert and Patricia Simmons. Patricia is the daughter of respondent Ronald Pryor, the Evanston police lieutenant who was on duty that day as the shift supervisor; petitioner Robert Simmons was an off-duty Evanston police

officer. Robert and Patricia were in the midst of a messy divorce; Pryor had recently lost fifty thousand dollars in a business venture with Robert. (Pryor Dep. 9.[1])

The first two officers on the scene, Jacqueline Collins and Duane Struchen, observed Robert and Patricia "more dancing than fighting," each complaining of a battery by the other. (Collins Dep. 15-16.) The officers separated the arguing spouses (Struchen Dep. 16, Collins Dep. 16) and called for a supervisor (Struchen Dep. 17.)

The supervisor, Sergeant Wernick, did not see any injuries to either spouse (Wernick Dep. 36-37) and did not receive any complaint from Patricia that Robert had threatened to use his firearm. (Wernick Dep. 34.) Wernick did not believe that there was any reason to arrest either Robert or Patricia. (Wernick Dep. 44.)

Following his return to the police station, Sergeant Wernick sought advice from the local prosecutor, who told Wernick that "it should go back to civil court, both parties should contact their attorney, and that there should be no criminal charges filed." (Wernick Dep. 39.) Wernick then informed his shift supervisor, respondent Pryor, of the prosecutor's advice. (Wernick Dep. 38-39.) According to Wernick, respondent Pryor "went along with what [Wernick] said," (Wernick Dep. 39), i.e., that no criminal charges would be filed.

After being told that charges were not going to be filed, Patricia became angry and complained to her father, the shift

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1. The depositions are part of Record Item No. 26.

supervisor respondent Pryor. (Struchen Dep. 34.) When deposed in this case, respondent Pryor claimed that his daughter had visible injuries and that she had told him that Robert had threatened her with his firearm. (Pryor Dep. 43.) No other officer observed injuries on Patricia. (Collins Dep. 25-26, Struchen Dep. 39, Wernick Dep. 37.) Although respondent Pryor was the fourth police officer to talk with Patricia, he was the first officer (and only officer) who claims to have heard Patricia mention a firearm. (Wernick Dep. 34.)

At the direction of respondent Pryor, petitioner was charged with battery. The arrest received wide publicity in the local community and injured plaintiff's reputation. (Complaint, par. 16.) The stress of the arrest and prosecution raised plaintiff's blood pressure and caused him to develop an ulcer. (Complaint, par. 22.)

After petitioner was acquitted of the criminal charges, he filed this lawsuit under 42 U.S.C. §1983. Petitioner alleged in his complaint that he had been deprived of Fourth Amendment rights when, at Pryor's direction, he was arrested without probable cause.[2] The district court concluded that the state trial judge's decision to permit the filing of the criminal complaint foreclosed plaintiff's civil rights action, (Pet.App. 15-16), and granted respondents' motion for summary judgment.[3]

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2. Petitioner also asserted a state claim of malicious prosecution against Pryor and his employer, the City of Evanston, Illinois.

3. The district judge dismissed the state malicious prosecution count on the theory that the State of Illinois was the proper defendant in a malicious prosecution case. (Pet.App. 17.)

On appeal, the Seventh Circuit rejected the district court's conclusion that the state judge's order was entitled to preclusive effect. (Pet.App. 5-6.) The court of appeals affirmed, however, finding that Pryor's actions were supported by probable cause.[4] (Pet.App. 7-10.) The court of appeals recognized that the police sergeant on the scene "did not think that there was probable cause," (Pet.App. 9), but held that the determination of probable cause by respondent Pryor, the father of the alleged victim, was "objectively reasonable" (Pet. App. 10), and did not present any jury question.

REASONS FOR GRANTING THE WRIT

This case raises the important question of whether a judge or a jury is to resolve credibility issues in civil actions seeking damages for the deprivation of rights secured by the Fourth Amendment.

The Seventh Circuit has concluded that "the burden of trials will be a substantial tax on police for the privilege of doing their already difficult jobs." *Gramenos v. Jewel Companies, Inc.*, 797 F.2d 432, 438 (7th Cir. 1986). In the Seventh Circuit, a police officer who causes an arrest because of malice or ill will is entitled to summary judgment on a showing that, irrespective of evil motive, an arrest *could* have

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4. In its initial opinion, the court of appeals held that a Fourth Amendment claim must allege lack of probable cause and malice. (Pet.App. 7.) The Seventh Circuit subsequently amended its opinion to delete this malice requirement. (Pet.App. 13.)

been made by a reasonable police officer. The pivotal issue in the Seventh Circuit is what "a reasonable officer could have believed . . . regardless of what [the arresting officer] actually believed or what theory he argued." *Scott v. Glumac,* 3 F.3d 163, 166 (7th Cir. 1993).

In conflict with the Seventh Circuit, the First Circuit has squarely held that police officers may not avoid damages for the violation of Fourth Amendment rights on the basis of "actions that they could have, but did not, take." *Santiago v. Fenton,* 891 F.2d 373, 387 (1st Cir. 1989) Similarly, the rule in the Tenth Circuit is that there is a jury question when the plaintiff comes forward with "specific evidence that the official's actions were improperly motivated." *Pueblo Neighborhood Health Centers v. Losavio,* 847 F.2d 642, 649 (10th Cir. 1988). The Fourth Circuit, though, appears to side with the Seventh Circuit, being of the view that "underlying intent or motivation" is not relevant to Fourth Amendment claims. *Turner v. Dammon,* 848 F.2d 440, 444 n.3 (4th Cir. 1988).

The question should not be whether a reasonable police officer *could* have believed that there was probable cause; the question should be whether a reasonable police officer *would* have believed that there was probable cause. A jury should determine reasonableness when, as here, there is substantial evidence that an arrest was made for an improper motive.

In this case, respondent Pryor's bad feelings towards petitioner, Pryor's desire to protect his daughter, and Pryor's resentment at having lost fifty thousand dollars in a business venture with petitioner, were factors that a jury would have weighed in deciding whether respondent Pryor ordered that petitioner be charged because there was "probable cause" or because he was motivated by malice. But under the rule applied by the Seventh Circuit, a police officer's motive is

irrelevant; what is controlling is what "a reasonable officer *could* have believed." *Scott v. Glumac, supra.* The better rule is to reserve for a jury the question of whether a reasonable officer *would* have believed that there was probable cause.

The Court confronted an analogous question in *St. Mary's Honor Center v. Hicks,* 113 S.Ct. 2742 (1993). There, the question involved the significance of the trier of fact's rejection of an employer's explanation for its allegedly discriminatory conduct. The Court held that evidence that the employer had offered a false explanation does not mandate a finding of discrimination, but "may, together with the elements of the prima facie case, suffice to show intentional discrimination." Id. at 2749. Similarly, in the situation at issue in this case, evidence that a police officer made an arrest for an impermissible purpose should be enough to warrant submission of the probable cause question to a jury, even when the officer *could* have acted lawfully.

After hearing all of the evidence, a jury in this case would have been entitled to conclude that a reasonable police officer — who was not the father of the alleged victim of a domestic battery and who had not recently lost fifty thousand dollars in a business venture with the "suspect" — would have concluded, as did Sergeant Wernick, that there was not probable cause to arrest plaintiff.[5]

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5. The court of appeals stated that Wernick did not rely on an absence of probable cause, but "simply decided that the matter would best be handed civilly in the court which issued the prior order of protection." (Pet.App. 9.) Wernick stated, however, that he saw no reason to arrest plaintiff (Wernick Dep. 44) until he was ordered to do so by respondent Pryor. (Id. at 45.)

In *Monroe v. Pape*, 365 U.S. 167, 187 (1961), the Court held that 42 U.S.C. §1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." A police officer who misuses his office to cause an arrest should be liable for damages under 42 U.S.C. §1983, irrespective of whether a reasonable police officer *could* have believed that there had been probable cause. The Court should review the decision of the Seventh Circuit which cuts off this remedy.

CONCLUSION

The petition for writ of certiorari should be granted.

March, 1994

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APPENDIX

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-2462

ROBERT SIMMONS,

Plaintiff-Appellant,

v.

RONALD PRYOR and CITY OF EVANSTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 91 C 2686—**Harry D. Leinenweber**, *Judge.*

ARGUED APRIL 2, 1993—DECIDED SEPTEMBER 9, 1993

Before CUDAHY and ROVNER, *Circuit Judges*, and REAVLEY, *Senior Circuit Judge.**

CUDAHY, *Circuit Judge.* Robert Simmons brought this § 1983 action alleging, *inter alia*, deprivations of his Fourth and Fourteenth Amendment rights in being arrested without probable cause. The district court granted defendants' motion for summary judgment on the ground that his arrest did not lack probable cause because a state judicial

* The Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

officer found probable cause in the complaint against Simmons. Because we find that the record establishes that there is no genuine issue of fact as to the existence of probable cause, we affirm.

I.

On the morning of October 14, 1989, City of Evanston police officers Duane Struchen and Jacqueline Collins responded to a report of a domestic disturbance. When they arrived at the designated address, the officers discovered Robert Simmons, whom they knew as a fellow Evanston police officer, and a woman identified as his wife, Patricia, involved in an altercation. After the officers separated the two and controlled the situation, both husband and wife complained of battery by the other. Patricia informed Officer Collins that her father was Lieutenant Ronald Pryor of the Evanston Police Department, that she had an order of protection against Simmons from a prior incident and that she wanted to sign a complaint against him.

Sergeant Charles Wernick then arrived on the scene. After evaluating the situation, Wernick called Lieutenant Pryor, who was the Watch Commander on duty at the time, and informed him of the situation. Wernick told Pryor that the order of protection had expired and that he thought it best that everyone go to the police station to sort out the incident. Wernick and Pryor agreed that, given his relationship to the parties, Pryor should let Wernick handle the case.

Upon arriving at the police station, Officer Wernick called Assistant State's Attorney Steve Laramore, who, after being informed of the circumstances, suggested that criminal charges not be brought but that the matter be left to the civil court that had issued the protective order. Pryor overheard part of this phone conversation, and when informed of the prosecutor's advice, initially went along with the recommendation. Simmons, who had been waiting at the police station for a number of hours, was told that he could leave, and Officer Collins told Patricia that no charges would be filed.

Patricia then went to her father, told him what had happened and insisted upon filing a criminal complaint against Simmons. Pryor spoke with his grandson, Robert, Jr., and another relative, Dawn Byrd. Robert, Jr., told Pryor that his father had come to pick him up for football practice, but upon seeing a car belonging to one of Patricia's friends, drove around the block, parked the car, retrieved a gun from his trunk and forced Robert, Jr., to open the door to the house. Both Robert, Jr., and Dawn Byrd told Pryor that Simmons had entered the house and that a fight ensued. Neither Dawn nor Robert, Jr., however, were able to tell Pryor who instigated the altercation.

Realizing the situation he was in, Pryor attempted to call his immediate superior, Commander Schroeder, but Schroeder could not be reached. Pryor then contacted Deputy Chief James Edwards who instructed Pryor to follow the department's general order involving compiaints of domestic violence.[1] According to Deputy Chief Edwards, if there is probable cause for a complaint to be signed, the order instructs that a complaint should be signed. The general order, which is patterned on the Domestic Violence Act, 750 ILCS 60/304 (1992), also instructs officers that the victim should be informed of his or her rights and encourages the police to get more involved in calls relating to a domestic disturbance in order to persuade more victims of domestic violence to file complaints.

When Edwards came into the station, Pryor and Sergeant Wharton told him that a complaint and emergency order of protection were being drawn up. Patricia was then taken to the home of Judge Loverde of the Circuit Court of Cook County, where she told him of the events of that morning. Judge Loverde signed the emergency

[1] Deputy Chief Edwards stated in his deposition that, in his opinion, the general order had not been followed when Patricia was not permitted to file a complaint. He also stated that calling the state's attorney in a case like this, i.e., one not involving serious injury, was "out of the ordinary."

order of protection and found probable cause for the complaint. Simmons was arrested but was acquitted of the battery charge on May 3, 1990.

One year later, Simmons filed this suit pursuant to 42 U.S.C. § 1983. Count I of the complaint alleged that Simmons was deprived of his Fourth Amendment rights when he was arrested at Pryor's direction without probable cause. Count II alleged that Pryor's misconduct deprived Simmons of substantive due process secured by the Fourteenth Amendment. Count III raised a state law claim for malicious prosecution and added the City of Evanston in its capacity as Pryor's employer.

The defendants subsequently filed a motion for summary judgment arguing (1) that there can be no dispute that there was probable cause for the arrest because the state judge found probable cause for the complaint, (2) that the substantive due process claim was not predicated upon a cognizable property or liberty interest and (3) that the state claim for malicious prosecution was meritless and, in any event, that the court had no jurisdiction to address the pendent claim once the federal claims had been rejected.

The district court granted the defendants' motion and awarded judgment against the plaintiff on each count. The court concluded that the finding of probable cause by the state judge precluded a determination that the defendants acted inappropriately. Thus, the court rejected the false arrest, substantive due process and malicious prosecution claims. No. 91 C 2686, Mem. Op. and Order (N.D. Ill. Apr. 23, 1992).

On a motion for reconsideration, the district court distinguished authority cited by the plaintiff that a finding of probable cause at an *ex parte* state court hearing is not entitled to preclusive effect in a subsequent civil rights action. *See Bailey v. Andrews*, 811 F.2d 366 (7th Cir. 1987). The court noted that the complaint in this case did not challenge the integrity of the evidence presented at the probable cause hearing, but merely the state judge's finding. That finding, the court held, cannot be second-guessed.

No. 91 C 2686, Mem. Op. and Order (N.D. Ill. May 21, 1992). The plaintiff appeals.

II.

We review the grant of summary judgment *de novo*. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). To affirm, we must conclude that the record and all inferences drawn from it, viewed in the light most favorable to Simmons, the non-movant, establish that no genuine issue of a material fact exists. Fed. R. Civ. P. 56(c).

The plaintiff argues that the district court erred in giving preclusive effect to the state judge's finding of probable cause. We agree. The Supreme Court in *Malley v. Briggs*, 475 U.S. 335, 345 (1986), held that the judgment of a judicial officer finding that probable cause exists does not prevent a suit against the police officer bringing the cause before the judge if a reasonably well-trained officer in the position of the defendant would have known that the action lacks probable cause and that he should not have applied for the warrant. "If such was the case, the officer's application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest." *Id.* Thus, in a subsequent civil action against the police officer, a judicial officer's finding of probable cause to issue a warrant is not dispositive. *See also Bailey*, 811 F.2d at 369-70 (plaintiff in § 1983 action not collaterally estopped from challenging *ex parte* finding of probable cause). Rather, the court must make its own determination whether a reasonable officer in the position of the defendant—"seeing what he saw, hearing what he heard"—would have believed that the person had committed a crime. *Mahoney v. Kesery*, 976 F.2d 1054, 1057 (7th Cir. 1992).

The defendant argues that *Malley* is distinguishable because in that case the police officer instigated the proceedings leading to the false arrest while in the present case, Patricia was the one who brought the criminal complaint before Judge Loverde. Although such a distinction may

implicate the causation requirement necessary for the plaintiff to make out a case against the defendant, it does not speak to the issue of the weight to be accorded the judge's finding of probable cause. In any event, here the plaintiff alleges that Pryor was instrumental in having the complaint go forward. Taken in the light most favorable to Simmons, there is evidence that Pryor ordered that the complaint be drawn up on Patricia's behalf.

Consequently, the district court erred in giving preclusive effect to Judge Loverde's finding of probable cause. Nonetheless, we can affirm the grant of summary judgment on any ground, even one not relied on by the district court, if the record fairly supports that disposition. *United States v. Thomas*, 934 F.2d 840, 843 (7th Cir. 1991). The defendants suggest that the record clearly establishes that there was probable cause to go forward with the complaint.

The plaintiff contends, however, that we must remand the case for trial because the defendants never put the existence of probable cause in issue in their motion for summary judgment. Simmons maintains that the defendants simply argued that Judge Loverde's finding of probable cause precluded this suit, and that he therefore was not obligated at that juncture to show that there existed a genuine issue whether probable cause was, in fact, lacking. According to the plaintiff, in order to defeat the defendants' motion, he needed to show only that the judge's finding was not preclusive.

Once a police officer defending a claim of false arrest moves for summary judgment on the ground that his actions were supported by probable cause and submits evidence that a duly authorized judicial officer found probable cause, the defendant has necessarily put probable cause at issue, and the plaintiff must thus come forward and show that there is an issue of fact as to the existence of probable cause to survive summary judgment. Although the plaintiff claims that he was not on notice that the existence of probable cause was at issue, we note that the plaintiff opened his memorandum opposing summary judgment with the argument that Pryor had not acted with

probable cause. Pl.'s Mem. in Resp. to Mot. for Summ. J. at 8. Only after the section entitled "The Absence of Probable Cause," and another section refuting the notion that Deputy Chief Edwards, rather than Pryor, instigated the action against Simmons, did the plaintiff address the defendants' claim that Judge Loverde's finding was preclusive. The plaintiff's brief before this court, moreover, contains a section similarly entitled, "The Absence of Probable Cause," Appellant's Br. at 11, and states that the "plaintiff did argue [before the district court] that Pryor had not acted with probable cause." *Id.* at 13 n.5; Appellant's Reply Br. at 6 ("plaintiff argued in the district court, as he has argued in this court, that there was not probable cause for plaintiff's arrest"). These responses belie the plaintiff's assertion that he was not "on notice" that the defendants were alleging that there was, in fact, probable cause. We think it plain that the plaintiff knew what was required to preclude summary judgment and that by looking to the record to determine whether there is a factual dispute as to probable cause, we are not denying the plaintiff an opportunity to show the absence of probable cause.

In order to make out an unlawful arrest claim, the plaintiff must show both a lack of probable cause and malice. *Kunik v. Racine County*, 946 F.2d 1574, 1582 (7th Cir. 1991). Both the lack of probable cause and malice are necessary and neither one is a sufficient condition for a claim of unlawful arrest. *See Fernandez v. Perez*, 937 F.2d 368, 371 (7th Cir. 1991) (malicious motives, absent probable cause, not enough to satisfy claim).

We believe that the record establishes that there was probable cause to believe that Simmons had committed battery and that the plaintiff thus cannot satisfy an essential element of his claim. A battery is committed when a person intentionally or knowingly without legal justification and by any means (1) causes bodily harm to an individual or (2) makes physical contact of an insulting or provoking nature with an individual. 720 ILCS 5/12-3 (1992). The absence of legal justification is not an element of the

offense, but rather is an affirmative defense to be raised by the defendant. *People v. Sambo*, 197 Ill. App. 3d 574, 554 N.E.2d 1080 (2d Dist. 1990). The victim's testimony is sufficient to support a battery conviction, *People v. Wilkinson*, 194 Ill. App. 3d 660, 551 N.E.2d 327 (1st Dist. 1990), and visible evidence of bodily harm is not necessary to obtain a conviction. *People v. Foster*, 103 Ill. App. 3d 372, 431 N.E.2d 430 (2d Dist. 1982).[2]

At the time that Pryor purportedly moved forward on the complaint, the undisputed evidence reveals that he had the following facts in mind. Pryor was aware that the officers arriving at the scene witnessed Simmons and Patricia "passing licks with open hands," and otherwise engaged in an altercation. Through his conversations with Patricia, the alleged victim and the one who had called the police about the disturbance, Pryor learned that she had been hit by Simmons in the chest and neck and that she claimed that Simmons had a gun and had threatened to kill everyone in the house. Patricia also told her father that Simmons had stated he would come and go from the house as he pleased and that she feared that if he came to her house again, someone would get killed. Patricia told Pryor that she wanted to file a criminal complaint against Simmons.

Pryor was also aware that Patricia had previously obtained an order of protection against Simmons and, thus, that she was at risk of potential abuse. Further, Robert, Jr., Patricia's and Simmons' son, told Pryor that he witnessed his father retrieve a weapon from his car's trunk and that Simmons then forced him to open the door to the house in which the incident took place.

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[2] Although Pryor claims (and Patricia confirms) that Patricia had visible injuries including bruises on her wrists and scratches on her neck, there is evidence suggesting that there were no signs of bodily injury. For purposes of summary judgment, therefore, we will assume that Patricia had no signs of bodily harm.

Finally, Pryor stated that he was aware of the mandates of the Domestic Violence Act, 750 ILCS 60/304. Under that Act, law enforcement officers are obligated to take steps to ensure the safety of victims of domestic violence and to inform such victims of their right to an emergency order of protection. 750 ILCS 60/304(a)(3). The officer is obligated, for instance, "after the close of business hours, [to] provid[e] or arrang[e] for transportation for the victim to the nearest available circuit judge or associate judge so the victim may file a petition for an emergency order under Section 217(c) of this Act." 750 ILCS 60/304(a)(1). And when a law enforcement officer does not arrest or otherwise initiate criminal proceedings against the abusing party, the officer must "[i]nform the victim of abuse . . . of the victim's right to request that a criminal proceeding be initiated where appropriate . . . ." 750 ILCS 60/304(b)(2). These requirements are reflected in the general order on domestic violence, to which Deputy Chief Edwards referred when advising Pryor of how to proceed in the matter.

The plaintiff contends that there was not probable cause to go forward on the complaint because Sergeant Wernick, " 'a prudent, reasonable, cautious police officer on the scene,' concluded after consultation with an assistant state's attorney there was not probable cause to arrest either Patricia or Robert." Appellant's Br. at 11. Just because Sergeant Wernick did not think that there was probable cause, however, does not mean that, under the objective standard, a reasonable officer in Pryor's shoes would not have thought that Simmons had committed a crime. In any event, there is no evidence that either Sergeant Wernick or the state's attorney concluded that there was not probable cause to go forward on a complaint against Simmons—they simply decided that the matter would best be handled civilly in the court which issued the prior order of protection.

In the light of this record, we find no genuine issue of fact as to the existence of probable cause and conclude

that Pryor's actions with respect to this matter were objectively reasonable. A reasonable officer in Pryor's position would have thought that there was ample basis to believe that Simmons committed the crime of battery and that the filing of a complaint was warranted. The plaintiff has thus failed to establish an essential element of his unlawful arrest claim, and summary judgment was appropriate. Since we reject the plaintiff's federal claims, we have no jurisdiction to address his pendent claim for malicious prosecution.

III.

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2462

ROBERT SIMMONS,

Plaintiff-Appellant,

No. 91 C 2686 *v.*

RONALD PRYOR AND
CITY OF EVANSTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2462 **Harry D. Leinenweber,** *Judge.*

[September 9, 1993]

HON. RICHARD D. CUDAHY, Chief Judge
HON. ILANA DIAMOND ROVNER, Circuit Judge
HON. THOMAS M. REAVLEY, Senior Circuit Judge[1]

JUDGMENT — ORAL ARGUMENT

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

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1. The Honorable Thomas M. Reavley, Senior Circuit Judge of the United States Court of Appeals for the Fifth Circuit, is sitting by designation. (1061-051993)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 92-2462

ROBERT SIMMONS,

Plaintiff-Appellant,

No. 91 C 2686 *v.*

RONALD PRYOR AND
CITY OF EVANSTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 92 C 2462 **Harry D. Leinenweber,** *Judge.*

[December 14, 1993]

HON. RICHARD D. CUDAHY, Chief Judge
HON. ILANA DIAMOND ROVNER, Circuit Judge
HON. THOMAS M. REAVLEY, Senior Circuit Judge[1]

ORDER

On consideration of the petition for rehearing with suggestion for rehearing in banc filed in the above-captioned cause and the response thereto, no judge in active service has requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

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1. The Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit is sitting by designation.

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

On further consideration of the petition for rehearing, the court amends its opinion, issued September 9, 1993, by deleting the full paragraph at the bottom of page 8 of the slip opinion and substituting the following therefor:

> In order to prevail in an unlawful arrest action, the plaintiff must show lack of probable cause. *Schertz v. Waupaca County*, 875 F.2d 578, 582 (7th Cir. 1989). ("[T]he existence of probable cause for arrest is an absolute bar to a Section 1983 claim for unlawful prosecution.") Even malicious motives will not support a claim of false arrest if probable cause exists. *Fernandez v. Perez*, 937 F.2d 368, 371 (7th Cir. 1991).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT SIMMONS,

Plaintiff,

No. 91 C 2686 *v.*

RONALD PRYOR AND
CITY OF EVANSTON,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Robert Simmons (''Simmons''), has brought a three-count complaint against defendants, Ronald Pryor (''Pryor'') and the City of Evanston. Simmons alleges false arrest without probable cause, deprivation of substantive due process, and malicious prosecution. The actions arise under 42 U.S.C. §1983 (''Section 1983'') and alleges violations of the Fourth and Fourteenth Amendment of the United States Constitution and Illinois law. The case is now before the court on defendants' motion for summary judgment.

FACTS

When considering a motion for summary judgment, a court may properly consider all undisputed material facts. The court must interpret all factual inferences in the light most favorable to the non-moving party. In the instant case, most of the facts underlying the complaint are not disputed. Where the parties disagree on the facts, for purposes of this motion, the court will accept plaintiff's version.

Simmons and his wife, Patricia Simmons (''Patricia''), were in the midst of a messy divorce in October, 1989. On the morning of October 14, 1989, Simmons entered Patricia's home and had a dispute with Patricia; Patricia telephoned the Evanston police to report the domestic disturbance. After the police arrived and restored order, both husband and wife complained of battery by the other. After everyone went to the police station, Officer Charles Wernick (''Wernick''), contacted the State's Attorney's office for

advice. He described the incident, including the fact that there were no obvious injuries to either spouse. In his deposition testimony, Wernick reports that the State's Attorney recommended against the filing of criminal charges and recommended the case go to the civil court which had earlier issued a protective order, since expired, for Patricia. Wernick dep. at 39. Officer Jacqueline Collins told Patricia that no charges were to be brought against Simmons.

Patricia's father, defendant Pryor, is a Lieutenant with the Evanston police. Pryor was the Watch Commander when his daughter and Simmons came to the station. Patricia told Pryor that she wished to swear out a complaint against her husband. After hearing the opinion of the State's Attorney from Wernick, Pryor contacted his superior, Deputy Chief James Edwards ("Edwards"). Edwards told Pryor to follow the Evanston Police Department General Order pertaining to complaints of domestic violence. He told Pryor that if probable cause existed, Patricia could sign a complaint. After discussions with those present during the incident, Pryor allowed Patricia to swear out a complaint and had the police draw up an Emergency Order of Protection ("protection order"). Judge Loverde of the Circuit Court of Cook County signed the protection order and found probable cause for the complaint. Based on the complaint, Simmons was arrested on October 16, 1989, for battery. On October 17, Judge Sullivan signed the arrest warrant.

Plaintiff alleges that Pryor's decision to allow Patricia to swear out the complaint was motivated by personal animus and a desire to help his daughter obtain a favorable divorce settlement. He also suggests Pryor was bitter over losing nearly $50,000 in a business venture with Simmons.

DISCUSSION

Count I

Count I of plaintiff's complaint alleges lack of probable cause for Simmons' arrest in violation of the Fourth Amendment. Judge Loverde, however, found probable cause for the complaint after hearing the testimony of Patricia. The court is not an appellate court for Judge Loverde and cannot second guess his opinion about the testimony he saw. Because the judge found probable cause, the actions of Pryor and the Evanston police in arresting plaintiff were

appropriate.

Plaintiff makes no attempt to argue that probable cause did not exist. Instead, plaintiff argues a constitutional violation occurred because Pryor's determination of probable cause was not made dispassionately. Whether Pryor harbored ill-will toward plaintiff is not material, however, if probable cause, in fact, existed. Doing the right thing for the wrong reason is not a constitutional violation. In the instant case, Pryor's determination was not the final word on probable cause. Judge Loverde came to the same conclusion. Plaintiff does not contend that the evidence presented to Judge Loverde was in any way manufactured or modified by defendants. *Cf. Kunik v. Racine County, Wis.*, 946 F.2d 1574, 1581-82 (7th Cir. 1991). Thus, Pryor's opinion on probable cause was no longer relevant at the time of the arrest.

Plaintiff observes that the police officers at the scene initially decided against bringing charges after consulting with the State's Attorney. This observation has no bearing in light of the subsequent judicial determination. Moreover, a police decision not to bring charges following a domestic dispute does not necessarily indicate that no probable cause existed. Police and prosecutors must consider a variety of factors in determining whether to file criminal charges. Until it was determined that Patricia affirmatively wished to swear a complaint, the State's Attorney may reasonably have concluded that the civil court could best resolve the matter. Plaintiff reads too much into the initial determination not to bring charges.

Plaintiff's final argument is that the police were unreasonable in arresting him without a signed arrest warrant. Plaintiff observes that the warrant was not signed until the day after the arrest. Given that Judge Loverde had made an express finding of probable cause before the arrest, this argument fails. Moreover, Judge Sullivan found probable cause for the arrest did exist, albeit after the arrest occurred. Because the undisputed facts do not demonstrate that a violation of the Fourth Amendment occurred, the court grants defendants' motion for summary judgment on Count I.

Count II

In Count II, plaintiff alleges Pryor violated his substantive due process rights under the Fourteenth Amendment. This claim has no more merit than Count I. Pryor's belief that probable cause existed did not lead to the arrest. Rather it was the decision by Judge Loverde based on the evidence before him that provided the basis for the police action. Plaintiff makes no meaningful argument in defense of his claim. Accordingly, the court grants defendants' motion for summary judgment on Count II.

Count III

Count III alleges malicious prosecution against both defendants. Because Judge Loverde found that probable cause existed for the arrest, and plaintiff has brought no evidence that this finding was in error, the malicious prosecution count cannot succeed. The Seventh Circuit has determined that "the existence of probable cause for arrest is an absolute bar to the plaintiff's Section 1983 claim for malicious prosecution." *Fernandez v. Perez*, 937 F.2d 368 371 (7th Cir. 1991). Even if the claim could be brought, it is unclear that either Pryor or the City of Evanston is a proper defendant; the State of Illinois is the entity which prosecuted plaintiff. The court grants defendants' motion for summary judgment on Count III.

CONCLUSION

The court grants defendants' motion for summary judgment on all counts of plaintiff's complaint.

IT IS SO ORDERED.

DATED: April 23, 1992

ENTER: /s/ Harry Leinenweber
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ROBERT SIMMONS,

Plaintiff,

No. 91 C 2686 *v.*

RONALD PRYOR AND
CITY OF EVANSTON,

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff, Robert Simmons (''Simmons''), brought a complaint against defendants, Police Lieutenant Ronald Pryor (''Pryor'') and the City of Evanston. Simmons alleged false arrest, deprivation of substantive due process, and malicious prosecution. The court granted defendants' motion for summary judgment on April 23, 1992. Plaintiff has now moved for the court to reconsider that decision.

Plaintiff and his wife, Patricia, had an argument which was broken up by the police. When Patricia later asked if she could swear out a complaint against her husband, the matter was handled by Pryor, who is also Patricia's father. Pryor allowed his daughter to swear out a complaint. A judge of the Circuit Court of Cook County found probable cause for the complaint after an ex parte hearing and Simmons was subsequently arrested.

The Seventh Circuit has held that a finding of probable cause at an ex parte state court hearing is not entitled to preclusive effect in a subsequent civil rights action. *Bailey v. Andrews,* 811 F.2d 366, 369-70 (7th Cir. 1987). Plaintiff argues the court gave undue deference to the state trial judge who found probable cause.

Plaintiff misunderstands the court's ruling. *Bailey* has no application here. Unlike in *Bailey,* the complaint and supporting brief do not challenge the integrity of the evidence presented at the probable cause hearing. This is not a case where, after making an arrest, the arresting officer presents his side to a judge at an ex

parte probable cause hearing and is later sued for false arrest. Pryor did not arrest Simmons or testify at the probable cause hearing. Pryor merely allowed the case to go to the judge to determine if there was probable cause. The arrest did not occur until the judge made his findings. *Compare Whitley v. Seibel*, 676 F.2d 245 (7th Cir. 1982).

The court cannot second-guess the state judge's ruling because plaintiff offers no basis on which to do so. Plaintiff's argument focuses exclusively on Pryor's decision to allow Patricia to swear out a complaint, and not on the ultimate finding of probable cause that led to the arrest. When considering a summary judgment motion, a court must look at all facts in the light most favorable to the non-moving party, but need not give weight to allegations unsupported by evidence. Plaintiff asserts he was arrested without probable cause, but presents no evidence that the judge's finding was in error. Plaintiff presents evidence that might show that Pryor's initial determination of probable cause was illegitimate, but because the arrest occurred after the judge found probable cause, plaintiff's allegations about Pryor are irrelevant. There is no question of material fact.

The court gives weight to the state court determination not because of collateral estoppel, but because plaintiff has not challenged it in a meaningful way.

The court denies plaintiff's motion to reconsider.

IT IS SO ORDERED.

DATED: May 21, 1992

ENTER: /s/ Harry Leinenweber
United States District Judge